1988

Blaine Thomas Hofeling v. Laura Catherine (Hofeling) Witowski : Petition for Rehearing

Utah Court of Appeals

David S. Dolowitz; Attorney for Respondent.
Steven Lee Payton; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

BLAINE THOMAS HOFELING,

Plaintiff/Appellant,

vs.

LAURA CATHERINE (HOFELING) WITOWSKI,

Defendant/Respondent.

PLAINTIFF/APPELLANTS PETITION FOR RE-HEARING ON DEFENDANT/RESPONDENTS "MOTION FOR DISMISSAL OF APPEAL" [UNTIMELY APPEAL]

*Utah Court of Appeals #880151-CA

3rd D/C Case No. D82-2587
(Judge, James S. Sawaya)

PETITION
&
APPELLANT RE-HEARING BRIEF

Plaintiff/Appellants Petition For Re-Hearing On
Defendant/Respondents "Motion For Dismissal of Appeal"
[Untimely Appeal]
Utah Court of Appeals
Honorable Regnal W. Garff, For the Court.
Order of Dismissal 3/31/88

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Attorney for Respondent

IN THE UTAH COURT OF APPEALS

BLAINE THOMAS HOFELING, Plaintiff/Appellant, vs. LAURA CATHERINE (HOFELING) WITOWSKI, Defendant/Respondent.	PLAINTIFF/APPELLANTS PETITION FOR RE-HEARING ON DEFENDANT/RESPONDENTS "MOTION FOR DISMISSAL OF APPEAL" [UNTIMELY APPEAL] *Utah Court of Appeals #880151-CA 3rd D/C Case No. D82-2587 (Judge, James S. Sawaya)

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Defendant/Respondents "Motion For Dismissal of Appeal"
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Utah Court of Appeals
Honorable Regnal W. Garff, For the Court.
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TABLE OF AUTHORITIES Page(s)

*JURISDICTIONAL STATEMENT [UTAH COURT OF APPEALS]

Utah Court of Appeals has jurisdiction pursuant to its own rules and case authority as follows:

Glad v Glad 567 P.2d 160 (UT 1977)]

Gilroy v Lowe 626 P.2d 469 (UT 1981)]

Rule 3 "Appeals as of Right; How Taken"

Rule 4 "Appeals as of Right; When Taken"

Rule 22 "Computation and Enlargement of Time"

*Rule 35 "Petition for Re-Hearing"

> "...(a) Time For Filing; Answer; Oral Argument Not Permitted...A rehearing will not be granted in the absence of a petition for rehearing. A matter may not be reheard by the Court en banc. A petition for rehearing may be filed with the Clerk within 14 days after the entry of the decision of the Court of Appeals, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner so desires. Counsel for the petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the Court...."

Rule 36 "Remittitur"

U.R.C.P. Rule 6(a) [Time-Computation]

This Petition For Re-Hearing of Order of Dismissal is based upon misapprehension of the facts and the law, same having not been pointed out to the court by the defendant/respondent, and said law being contrary to the Motion For Dismissal and directly on point.

STATEMENT OF NATURE OF PROCEEDINGS

Petition For Re-Hearing on Order of Dismissal of the court entered 3/31/88 based upon Rules of Utah Court of Appeals 4(a) and U.R.C.P. Rule 58A(d) neither of which are determinative of the motion and counsel for defendant/respondent having not pointed out to the court that there is case law directly on the point and which is controlling including but not limited to authority as follows:

Glad v Glad 567 P.2d 160 (UT 1977)]

Gilroy v Lowe 626 P.2d 469 (UT 1981)]

Rule 22 "Computation and Enlargement of Time"

STATEMENT OF ISSUE

Appeal was timely filed pursuant to statutory provisions and case law interpreting time for filing and computation of time.

RELIEF SOUGHT

Plaintiff/Appellant seeks a re-hearing on Order of Dismissal and that same be recinded based upon a misapprehension of the law as set out by the Utah Supreme Court with regards to computation of time for filing of appeal.

[STATEMENT OF THE CASE]
PETITION FOR RE-HEARING
(Rule 35 [Petition For Re-Hearing])
(Rule 27(a) [Form of Petition])

COMES NOW, the above-named Plaintiff/Appellant by and through his Attorney of Record, Steven Lee Payton, and hereby petitions the court for re-hearing on dismissal order [untimely appeal] 3/31/88 the court having overlooked or misapprehended points of law from the Supreme Court of Utah upon the specific issue herein and pursuant to said decisions plaintiff/appellants appeal is timely. [Glad v Glad 567 P.2d 160 (UT 1977)]

[R. Ut. Ct. App. Rule 22 "Computation of Time"]

Timeliness of Petition

Furthermore said petition for re-hearing is filed pursuant to R. Ut. Ct. App. Rule 35 "Petition For Re-Hearing" within fourteen (14) days after entry of decision of the court March 31, 1988 Order of Dismissal [Untimely Appeal].

Petition In Good Faith

Counsel for plaintiff/appellant certifies that this petition is presented in good faith, not for delay, and is based upon case law set out herein.

Defendant/Respondent Motion

Defendant/Respondents motion for dismissal of appeal cited no authority and was not in proper form pursuant to requirements of the Utah Court of Appeals Rules, applicable as follows:

Rule 10 "Motion For Summary Disposition"
Rule 23 "Motions-Content"
Rule 27 "Motions-Form"

Request For Oral Argument

Oral argument is requested herein however allowable only in the discretion of the court pursuant to R. Ut. Ct. App. Rule 2 "Suspension of Rules" it being in the interest of justice herein and it appearing that the court has misapprehended the law.

Rules of Professional Responsibility

Further defendant/respondent failed to disclose adverse case authority contrary to the motion [Rules of Professional Conduct Rule 3.3 "Candor Toward The Tribunal" [Effective January 1, 1988].

Rule 3.3 "Candor Toward The Tribunal"

"...(a) A LAWYER SHALL NOT KNOWINGLY:

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...."

Comment: MISLEADING LEGAL ARGUMENT

"...Legal argument based on a knowingly false representation of law constitutes dishonesty toward a tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party...." (Emphasis Added)

STATEMENT OF FACTS

Date	Description
01/26/88 (Tues.) [Addendum 1]	James S. Sawaya, Third District Court Judge signed "Order Declining Jurisdiction" in a case that had previously been heard in Utah and pending since 1982 and in which the divorce was granted in the state of Utah and where parties resided.
01/26/88 (Tues.) [Addendum 2,3]	Order filed in Clerks Office 3rd D/C SLCo.
01/26/88 (Tues.) [Postmarked 1/27/88] [Addendum 5]	Notice of decision was given to all parties by minute entry however plaintiff/appellants appeal is still timely herein.
02/26/88 (Fri.) [Addendum 3,4]	Plaintiff/Appellant herein filed an appeal to the Utah Court of Appeals, copy attached.
02/26/88 (Fri.) [Addendum 8]	Bond on Appeal [Receipt #20032]
03/08/88 (Tues.) [Addendum 1-4]	Counsel for defendant/respondent filed a Motion For Dismissal of Appeal, copy of which is attached.
03/31/88 (Thurs.) [Addendum 6,7]	Court entered an Order of Dismissal based upon the fact that the appeal was untimely under R. Utah Ct. App. 4A and U.R.C.P. Rule 58A(d).
---	---
04/13/88 (Wed.)	Plaintiff/appellant files a Petition For Re-Hearing for reason that the court ruling is contrary to the law of the Supreme Court regarding calculation of time.

LIST OF EXHIBITS

ADDENDUM

MEMORANDUM OF AUTHORITY

(Rule 23(3) "Motions" [Rules Utah Court of Appeals]
[All motions shall be accompanied by a brief statement of points and authorities]

SUMMARY OF ARGUMENT

APPEAL WAS TIMELY FILED PURSUANT TO STATUTORY PROVISIONS AND CASE LAW INTERPRETING TIME FOR FILING AND COMPUTATION OF TIME.

POINT

APPEAL WAS TIMELY FILED PURSUANT TO STATUTORY PROVISIONS AND CASE LAW INTERPRETING TIME FOR FILING AND COMPUTATION OF TIME.

TIME FOR APPEAL

Jurisdiction Court of Appeals

U.C.A. 78-2a-3 "Court of Appeals Jurisdiction" [Effective January 1, 1988]

"...(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

"(g)...[A]ppeals from district court involving domestic relations cases including, but not limited to, divorce annulment, property division, child custody, support and visitation, adoption, and paternity...."

Utah Court of Appeals Rules

Rule 3(a) "Appeals as of Right; How Taken"

"...(a) Filing appeal from final orders and judgments. As defined and provided by law, an appeal may be taken from the final orders and judgments of a district court, juvenile court, or circuit court to the Court of Appeals by filing a notice of appeal with the clerk of the particular court from which the appeal is taken within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorneys fees...."

Rule 4 "Appeals as of Right: When Taken"

"...(a) Appeal From Final Judgment and Order. In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from...." (Emphasis Added)

COMPUTATION OF TIME

R. Utah Ct. App. Rule 22 "Computation and Enlargement of Time"

> "...In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute the day of the act, event, or default from which the designated period of time begins to run shall not be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state and federal governments...." (Emphasis Added)

U.R.C.P. Rule 6 [Time]

> "...(a) Computation In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation...." (Emphasis Added)

U.C.A. 68-3-7 "Time How Computed"

> "...The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded...." (Emphasis Added)

U.C.A. 78-27-19 "By Law Defined"

> "...Wherever in this Code the term "by law" is used with reference to any act or thing done or to be done, such term shall refer to all statutes in effect as well as the Rules of Civil Procedure or other court rules and any decision of the Supreme Court interpreting the same...." (Emphasis Added)

*CASE INTERPRETATIONS

Glad v Glad 567 P.2d 160 (UT 1977)

"...@pg 162...Defendant asserts that the appeal should be dismissed as not being timely and in support thereof points out the order appealed from was entered October 28, 1976, and that the notice of appeal was filed on November 29, 1976, more than one month after entry of said order. Rule 6(a) U.R.C.P. is dispositive of this point in providing for the computation of time that the day of the act, event, or default after which the designated period of time begins to run is not included. Also, if the last day of the period falls on Sunday it is not included and such was the case here. Consequently the appeal was timely filed...." (Emphasis Added)

Gilroy v Lowe 626 P.2d 469 (UT 1981)

"...@pg 471...The method of computing time periods relating to acts provided for by law is set out in Rule 6(a), Utah Rules of Civil Procedure, and §§68-3-7 and 8, U.C.A. 1953, as amended. When the time period is measured in months or years from a certain date, the day from which the time period is to run is excluded and the same calendar date of the final month or year is included See Albrecht v Uranium Services, Inc. Utah, 596 P.2d 1025 (1979). Furthermore even if the limitations period expired on October 21, 1979, that date was a Sunday and the time period extended until the end of the next day See Nelson v Jorgenson, 66 Utah 360, 242 P 945 (1926). The execution sale on October 22, 1979 was timely, as was properly found by the trial court...."
(Emphasis Added)

*COPIES OF BOTH CASES ARE INCLUDED IN THEIR ENTIRETY IN ADDENDUM. Page 9-13

COMMENTARY

Tuesday, March 8, 1988 counsel for defendant/respondent filed with the Utah Court of Appeals a Motion For Dismissal of Appeal, grounds and basis for which were that the plaintiff/appellants appeal was not timely filed for reason that the Order appealed from was entered January 26, 1988 and the Notice of Appeal was filed February 26, 1988, it being the assertion of the defendant/respondent that that is 31 days after entry of the trial court Order from which appeal is taken. The motion further alleged that plaintiff/appellants appeal was contrary to R. Ut. Ct. App. Rule 4(a) which provides as follows:

Rule 4 "Appeals as of Right: When Taken"

"...(a) Appeal From Final Judgment and Order. In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from...."
(Emphasis Added)

Defendant/respondent cited no case authority and furthermore did not cite to the court its own rules nor case authority of the Utah Supreme Court contrary to defendant/respondents motion as follows:

R. Ut. Ct. App. Rule 22(a) "Computation of Time"

"...(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state and federal governments...." (Emphasis Added)

R. Ut. Ct. App. Rule 3 "Appeals as of Right; How Taken"

R. Ut. Ct. App. Rule 4 "Appeals as of Right; When Taken"

Glad v Glad 567 P.2d 160 (UT 1977)

Gilroy v Lowe 616 P.2d 469 (UT 1981)

Plaintiff/appellant had 30 days from the date the order was entered [Tuesday, January 26, 1988] in which to file an appeal.

Based upon the Rules of the Utah Court of Appeals and decisions of the Utah Supreme Court as set out herein Glad, supra. p.10 computation of time in this case must exclude Tuesday, January 26, 1988 that being the date that the order was entered as appearing from the face thereof [Addendum Exhibit 2-3]. January 27, 1988 would then be the first day and the 30th day would be Friday, February 26, 1988. Calendar is set out herein for purposes of the court examining the dates.

JANUARY 1988

S	M	T	W	TH	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

FEBRUARY 1988

S	M	T	W	TH	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29					

Based upon the courts own rules for computing time as well as court decisions, excluding the first day and including the last pursuant to R. Ut. Ct. App. Rule 22 "Computation and Enlargement of Time" the plaintiff/appellants appeal was timely filed.

This same issue was raised in the case of Glad v Glad 567 P.2d 160 (UT 1977) and Gilroy v Lowe 616 P.2d 469 (UT 1981) and the Utah Supreme Court interpreted the provisions for computation of time as has the plaintiff/appellant herein that being that one excludes the first day on which order is filed with the clerk.

Defendant/Respondent was under a duty to advise the Court of Appeals in the Motion To Dismiss of the cases interpreting computation of times since Glad v Glad, supra. specifically involves a domestic relations case as is the case on appeal herein. Failure to so advise the court of this case and facts amounted to misleading the court.

Defendant/Respondents computation of time purportedly representing that it is based upon R. Ut. Ct. App. Rule 4(a) would be correct as being 31 days only if one counts January 26, 1988, the date that the order was entered in the clerks office. It is clear however that the Utah Supreme Court by case law as well as Utah Court of Appeals Rules [R. Ut. Ct. App. Rule 22 "Computation of Time"] specify that the first day is excluded from the period of time therefore plaintiff/appellants appeal was timely.

Further authority contrary to the defendant/respondents assertion can be found as follows:

> Federal Court of Appeals Manual [Manual of Practice In The United States Court of Appeals] David G. Knibb West Publishing Company, St. Paul, Minnesota 1981
>
> "...@pg 57 Chapter 5 Section 5.3...The appeal period in a civil case is thirty days. In a criminal case it is ten. Day one is the first day after entry of the order or judgment from which the appeal is to be taken, and day thirty (in a civil appeal) is the last day to file the notice of appeal. If the last day falls on a weekend or legal holiday, as defined in F.R.A.P. Rule 26(a), the period extends to the end of the next regular business day. This applies even if the last day is a Saturday and the clerks office is open. The desperate can still meet the deadline after the clerks office has closed on the last day by personally delivering the notice to the clerk, together with the prescribed filing fee...." (Emphasis Added)

Conclusion

Based upon statutory provisions and case law regarding computation of time the appeal herein was timely. The defendant/respondent did not point out the existing case law and interpretations of statutes under computation of time and accordingly and therefore the Utah Court of Appeals misapprehended the case law herein. Plaintiff/appellant is entitled to have the Order of Dismissal recinded and his appeal reinstated so that the appeal may progress in its normal course and he requests such relief.

DATED this 13th day of April, 19 88.

Steven Lee Payton
Attorney for Plaintiff/Appellant

ADDENDUM

DAVID S. DOLOWITZ (0899)
of and for
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IN THE COURT OF APPEALS

STATE OF UTAH

* * * * *

BLAINE THOMAS HOFELING, Plaintiff, v. LAURA CATHERINE (HOFELING) WITOWSKI, Defendants.	MOTION FOR DISMISSAL OF APPEAL Civil No. D82-2587 Judge James S. Sawaya

* * * * *

Respondent, Laura Catherine (Hofeling) Witowski, hereby moves the above-entitled court to dismiss the appeal of the plaintiff/appellant on the grounds that it is not timely filed, to-wit: The Order Declining Jurisdiction from which the appeal is taken was filed and entered on January 26, 1988 (see Exhibit "A" attached hereto); the Notice of Appeal in this matter was filed on February 26, 1988, (see Exhibit "B" attached hereto); that is 31 days after the entry of the Order when, as a jurisdictional requirement, the appeal was required, pursuant to the provisions of Rule 4(a) of the Rules of the Utah Court of Appeals to be filed within thirty (30) days from the entry of the Order from which the appeal is taken.

DATED this 8 day of March, 1988.

DAVID S. DOLOWITZ
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true copy of the above and foregoing Motion for Dismissal of Appeal, this 9 day of March, 1988, to:

Mr. Steven Lee Payton
Attorney at Law
431 South 300 East, Suite 40
Salt Lake City, Utah 84111

DAVID S. DOLOWITZ

DAVID S. DOLOWITZ, Esq. (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Defendant
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P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * * * *

BLAINE THOMAS HOFELING, Plaintiff, vs. LAURA CATHERINE (HOFELING) WITOWSKI, Defendant.	ORDER DECLINING JURISDICTION Civil No. D82-2587 Judge James S. Sawaya

* * * * * * *

The above-entitled came before the Court on December 7, 1987, the Honorable James S. Sawaya presiding, for consideration of the Motion of the Defendant to Decline Jurisdiction Over Issue of Custody and Visitation of Children. The Plaintiff was present in person, represented by counsel Steven Lee Payton. The Defendant was represented by counsel David S. Dolowitz. The Court heard and considered the arguments and representations of counsel, examined and considered the records, files and papers in this matter and determined to take the matter under advisement. After being advised in the premises, the Court has determined that the defendant and minor children of the parties moved from the State of Utah and have resided in the State of Florida since September 1, 1984, that the Courts of the State of Florida have determined in the action entitled Laura Catherine Hofeling (Witowski), Petitioner vs. Blaine Thomas Hofeling, Respondent, Circuit Civil No. 87-6371-20, in the Circuit Court in and for Pinellis County, State of Florida, Judge John S. Andrews presiding, that it should assume jurisdiction over the custody and visitation issues in this matter pursuant to the provisions of the Uniform Child Custody Jurisdiction Act and, accordingly, the Florida Courts are a more convenient forum and this Court should, pursuant to the provisions of Section 78-45(c)-7, Utah Code Annotated (1987 Rep.), decline to exercise jurisdiction over the questions of custody and jurisdiction of these children and allow that matter to proceed before the Courts of the State of Florida.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this Court declines jurisdiction over the questions of custody and visitation of the minor children in the above-referenced matter to enable the Circuit Court of Pinellis County, State of Florida to resolve those questions in the action entitled Laura Catherine Hofeling (Witowski), Petitioner vs. Blaine Thomas Hofeling, Respondent, Circuit Civil No. 87-6371-20.

EX H

DATED this 26 day of ~~December~~ January, 1988.

JAMES S. SAWAYA
District Court Judge

ATTEST
H. DIXON HINDLEY
Clerk
By _____ Deputy Clerk

APPROVED BY:

STEVEN LEE PAYTON
Attorney for Plaintiff

DAVID S. DOLOWITZ
Attorney for Defendant

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 26th DAY OF FEBRUARY 1988
H. DIXON HINDLEY, CLERK
BY Marie Fairclough DEPUTY

Rebecca D. Stanton
"Becky"
LEGAL ASSISTANT

Steven Lee Payton
LAWYER
431 SOUTH 300 EAST, SUITE 40
SALT LAKE CITY, UTAH 84111-3298
TELEPHONE (801) 363-7070

STEVEN LEE PAYTON (#2554)
Attorney for Plaintiff
431 South 300 East, Suite 40
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Telephone: (801) 363-7070

FILED
FEB 2[illegible]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

PLAINE THOMAS HOFELING, Plaintiff/Appellant, vs. LAURA CATHERINE (HOFELING) WITOWSKI, Defendant/Respondent.	NOTICE OF APPEAL Civil No. D82-2587 (Judge, James S. Sawaya)

Authority

R. Utah Ct. App. Rule 3 [Appeal As Of Right: How Taken]

R. Utah Ct. App. Rule 4 [Appeal As Of Right: When Taken]

U.C.A. 78-2a-3(g) [Court of Appeals Jurisdiction] [Effective January 1, 1988]

Appeals From District Court Involving Domestic Relations Cases

Ex B

1. Party Appealing: Notice is hereby given that PLAINTIFF above-named hereby appeals to the Utah Court of Appeals.

2. Judgment or Order: Appeal is from the Judgment & Order dated January 26, 1988, Judge, James S. Sawaya, Declining Further Jurisdiction in the within entitled case; said order having been signed January 26, 1988 and notice of same having been given to counsel by Minute Entry January 26, 1988 certifing that it was mailed January 26, 1988 however postmarked January 27, 1988 to counsel herein.

3. Court Appeal From: Appeal is taken from the Third District Court of Salt Lake County, State of Utah.

4. Appeal To: Appeal is taken to the Utah Court of Appeals pursuant to its jurisdictional authority as set out herein.

DATED this 26th day of FEBRUARY, 19 88.

Steven Lee Payton
Attorney for Plaintiff

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 26 DAY OF February 19 88.

H DIXON HINDLEY, CLERK
BY _____ DEPUTY

Rebecca D. Stanton
"Becky"
LEGAL ASSISTANT

Steven Lee Payton
LAWYER
431 SOUTH 300 EAST, SUITE 40
SALT LAKE CITY, UTAH 84111-3256
TELEPHONE (801) 363-7070

AFFIDAVIT OF MAILING

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was mailed via United States Mail, first class, postage prepaid on the 26th day of FEBRUARY, 19 88, to the following:

David S. Dolowitz, Esq.
525 East 100 South, Suite 500
P.O. Box 11008
Salt Lake City, UT 84147-0008
Certified Mail #P717-949-000

David M. Wall, Esq.
The Atrium
2420 Enterprise Road, #204
Clearwater, FL 34623
Certified Mail #P717-949-001

Blaine T. Hofeling
4329 Shirley Lane
Salt Lake City, UT 84117
(U.S. Certificate of Mailing)

Steven Lee Payton

Authority

Rules of Practice in the District Court and Circuit Courts of the State of Utah;

Rule 2.9 "Written Orders, Judgments & Decrees";

U.C.A. 77-35-3 Rule 3 "Service & Filing of Papers";

U.R.C.P. Rule 5 "Service and Filing of Pleadings and Other Papers"

R. Utah Ct. App. Rule 21 "Filing and Service"

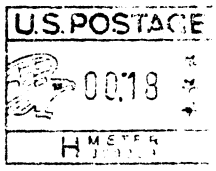
SUBSCRIBED and SWORN to before me this 26th day of February, 19 88.

Rebecca D. Stanton
Notary Public

REBECCA D. STANTON
NOTARY PUBLIC - STATE OF UTAH
COUNTY OF SALT LAKE
My Comm. Expires July 7, 1990

Salt Lake County
H. DIXON HINDLEY, CLERK
240 East 400 South
P.O. Box 1860
Salt Lake City, Utah 84110

PRESORTED
FIRST CLASS



Steven Lee Payton
431 South 300 East
Suite 40
Salt Lake City, Utah 84111

MINUTE BOOK FORM 101

THIRD JUDICIAL DISTRICT
County of Salt Lake - State of Utah

FILE NO. D82-2587

TITLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
BLAINE THOMAS HOFELING	Steven Lee Payton
-vs-	
LAURA CATHERINE (HOFELING) WITOWSKI	David S. Dolowitz

CLERK

REPORTER

BAILIFF

HON. James S. Sawaya
JUDGE

DATE: January 26, 1988

1/25/88 HEARD: Plaintiff's objection to order submitted by defendant.

The Court, having reviewed and examined orders submitted by both parties, now determines that the order submitted by defendant is a proper order reflecting the findings and intent of the court. The order is signed and entered this date. Plaintiff's proposed order is filed unsigned.

J. Sawaya

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Dated January 26, 1988

FILED

MAR 31 1988

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

----ooOoo----

Blaine Thomas Hofeling, Plaintiff and Appellant, v. Laura Catherine (Hofeling) Witowski, Defendant and Respondent.	)	ORDER OF DISMISSAL Case No. 880151-CA

Before Judges Garff, Jackson and Orme (On Law and Motion).

The motion of defendant-respondent Laura Catherine (Hofeling) Witowski to dismiss the above-entitled appeal as untimely is granted and the appeal is hereby dismissed. See R. Utah Ct. App. 4(a) and Utah R. Civ. P. 58A(d).

DATED this 31 day of March, 1988.

FOR THE COURT:

Regnal W. Garff, Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER OF DISMISSAL by depositing the same in the United States mail postage prepaid to the following:

Steven Lee Payton
Attorney at Law
431 South 300 East, Suite 40
Salt Lake City, UT 84111

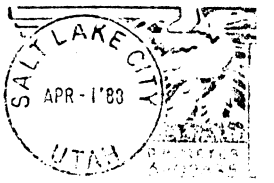
David S. Dolowitz
Attorney at Law
Cohne, Rappaport & Segal
525 East First South, Suite 500
P.O. Box 11008
Salt Lake City, UT 84147-0008

Salt Lake County Court
Dixon Hindley, Clerk
Attn: LaDean Parker, Clerk
240 East 400 South
Salt Lake City, UT 84111

DATED this 1st day of April, 1988.

By _____
Case Manager

Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102



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SALT LAKE CITY, UTAH 84111

H. DIXON HINDLEY
COUNTY CLERK

TEL.(801)535-7541

CASE NUMBER	DATE	CHECK CASH	JUDGE	RECEIPT NO	RECD BY
D 8202587	02/26/88	X	JAMES S. SAWAYA	8806388	JB

RECEIVED OF: STEVEN PAYTON**125.00 TO UTAH COURT OF APPEALS**

	NAME	ATTORNEY	I.D. NO.
PLAINTIFF:	HOFELING BLAINE THOMAS		0
DEFENDANT:	HOFELING LAURA CATHERINE		

CODE	DESCRIPTION	AMOUNT
060	APPEAL TO APPELLANT COURT	$30.00
	TOTAL FEES PAID	$30.00

SALT LAKE COUNTY CLERK
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240 EAST FOURTH SOUTH
SALT LAKE CITY, UTAH

FINES & FORFEITURES

2-26 19 88

Nº 20032

RECEIVED OF Steven L. Payton

Three Hundred ~~Fifty~~ 10 ~~—~~ DOLLARS $ 30.

~~Hofeling~~ vs. ~~Hofeling~~ (Witowski)
Cost Bond

H. DIXON HINDLEY, CLERK

CASE NO. D82-2587

BY _____ DEPUTY

[1] Each of these insurers should be regarded as standing in the shoes of its own insured and as having the same rights and liabilities as its insured has. Therefore, it is appropriate to determine who would bear the loss if no insurance existed.

[2] Under the common law, any liability would be upon Mr. Johnson, the alleged tort-feasor, and his insurer (Horace Mann) would be obliged to step into his shoes and defend him. However, the Public Employees' Indemnification Act has altered this. In requiring public entities to protect their employees from such losses by defending and indemnifying them for claims arising from activities within the scope of their employment, except for acts of "gross negligence, fraud or malice,"[2] the statute shifts liability to the school district.

In addition to this shifting of liability from the teacher to the school district, the statute further specifically provides that if the public entity (the school district here) pays such a claim, the entity cannot seek reimbursement from its employee (Johnson here).[3] Those statutory provisions which thus transfer responsibility for such a claim from the employee to the school district, and further provide that the district cannot even obtain reimbursement from the employee, manifest a clear legislative intent that it is the school district and not the employee who must bear any such a loss.[4] What protection the school teachers may or may not receive from defendant Horace Mann is not material here. But, it may be of interest to observe that the latter's policy does cover excess over that insured by plaintiff Gulf and perhaps other matters excepted by the statute.

On the basis of what has been said above, it is our conclusion that the trial court correctly ruled that it is the school district and its insurer plaintiff Gulf Insurance Company, which are obligated to defend and respond on behalf of the teacher, Russell Johnson.

Affirmed. Costs to defendant (respondent).

ELLETT, C. J., and MAUGHAN, WILKINS and HALL, JJ., concur.

2. Sec. 63 48-5, U.C.A.1953. "(1) Except as provided in subsection (2) of this section, if a public entity pays all or part of any judgment based on or a compromise or settlement of the claim against itself or an officer or employee, the officer or employee is not liable to indemnify the public entity for this payment. (2) If the public entity pays all or part of any judgment based on a claim against itself or an officer or employee, the public entity may recover the amount of such payment if it is established that the officer or employee acted or failed to act due to gross negligence, fraud, or malice."

3. Ibid. See subsection (1) above.

4. *St. Paul Ins. Co. v. Horace Mann Ins. Co.*, 231 N.W.2d 619 (Iowa 1975); *Bridewell v. Board of Education*, 2 Ill.App.3d 684, 276 N.E.2d 745 (1971).

Arla Jean GLAD, now Arla Jean Segmiller, Plaintiff and Appellant,

v.

Harvey Lowell GLAD, Defendant and Respondent.

No. 14894.

Supreme Court of Utah.

July 8, 1977.

Order to show cause was obtained by divorced wife to enforce support provisions of second divorce decree. The ex-husband moved to dismiss the order for lack of jurisdiction and wife moved to dismiss first divorce case and vacate its decree on ground of reconciliation. The Third District Court, Salt Lake County, Stewart M. Hanson, Sr., J., granted husband's motion to dismiss, determining decree in initial case had become final, and wife appealed. The Supreme Court, Hall, J., held that: (1) husband's timely motions objecting to findings and conclusions suspended all proceedings as to first decree until court disposed of it and, since motion was merely stricken from calendar and not heard on its merits, there was not a final disposition and consequently the first divorce did not become absolute; and (2) second decree which parties abided by without any attack was valid and absolute and supported wife's order to show cause.

Judgment of dismissal of order to show cause reversed, case remanded for hearing thereon.

Crockett, J., concurred in result, but dissented in part and filed opinion.

1. Divorce ⇐150.2

Ex-husband's timely motions objecting to findings and conclusions suspended all proceedings in divorce case until court disposed of it and, since motion was merely stricken from calendar and not heard on its merits, there was not a final disposition and consequently the divorce did not become absolute.

2. Divorce ⇐243

Where divorce decree was two years old and parties abided by it without any attack thereon, the decree was valid and absolute and supported order to show cause to enforce its support provisions.

3. Time ⇐9(8), 10(9)

Although order appealed from was entered on October 28, 1976 and notice of appeal was filed on November 29, appeal was not untimely, in view of rule excluding day of act from any designated time period and excluding last day of period if it falls on Sunday. Rules of Civil Procedure, rule 6(a).

Leland S. McCullough, McCullough & McCullough, Salt Lake City, for plaintiff and appellant.

Quentin L. R. Alston, Salt Lake City, for defendant and respondent.

HALL, Justice:

Appeal from an order of dismissal of an order to show cause filed in the District Court of Salt Lake County.

The Glads were parties to a contested divorce action wherein findings of fact, conclusions of law and decree of divorce were entered on April 23, 1973. Three days later defendant filed a document entitled "Notice" which was duly served upon plaintiff advising of a hearing date of May 14, 1973, on defendant's objection to the said findings, conclusions and decree claimed therein to be contrary to the court's order and minute entry. On the date scheduled for the hearing of said objections neither party appeared and on the court's own motion the objections were stricken from the calendar. Defendant does not challenge the validity of the pleading entitled "Notice" as being also an objection, and in fact refers to it as such.

Some three months later the parties lived together for a time without re-marrying and after a further time Mrs. Glad again filed an action for divorce, making no reference to the prior decree, and obtained a second decree by default. Over two years later Mrs. Glad sought and obtained the order to show cause in question attempting to enforce the support provisions of the second degree. It was heard by the same trial judge that granted the second decree and when the facts concerning the first decree surfaced Mr. Glad moved to dismiss the order to show cause for lack of jurisdiction and Mrs. Glad moved to dismiss the first case and vacate its decree on the grounds of reconciliation. The court granted Mr. Glad's motion to dismiss determining the decree in the initial case had become final. On appeal Mrs. Glad assigns as error (1) the court's refusal to dismiss the first case and thus render the decree in the second case a valid, final decree, and (2) failing to support its ruling with findings of fact and conclusions of law.

The rules provide for amendment of a judgment on motion of a party made not

later than 10 days after entry of judgment,[1] and the divorce statutes provide that a decree shall not become absolute until the expiration of three months from the date of entry and not then if an appeal or other proceedings for review are pending.[2]

The foregoing have been previously interpreted by this court. In *Spencer v. Clark*[3] the defendant in a divorce proceeding filed a motion to set aside the findings of fact and conclusions of law for the reason that they did not conform to the testimony adduced at trial. The court determined that the motion prevented the divorce from becoming absolute until the statutory period (then six months) had elapsed after the motion was disposed of.

A similar result was reached in *Boucofski v. Jacobsen*[4] wherein the power of a court to modify its findings was recognized and further noted that the time for appeal begins to run from the date the additional findings or conclusions are made and entered, not from the date of the original judgment.

[1] We again hold that a timely motion setting forth objections suspends all proceedings until the court disposes of the same and that since the motion was merely stricken from the calendar and not heard on its merits, such was not a final disposition and consequently the first divorce did not, and has not as yet, become absolute. Having so ruled, it is not necessary to treat the further assignments of error, nor is it necessary to reverse the trial court's refusal to dismiss the first case.

[2] The second decree, being some two years old, and the parties having abided by it without any attack thereon, jurisdictional or otherwise, we hold to be valid and absolute and properly supportive of the order to show cause dismissed below.

1. Rule 52(b), Utah Rules of Civil Procedure.
2. Section 30-3-7, U.C.A.1953.
3. 54 Utah 83, 179 P. 741 (1919).
4. 36 Utah 165, 104 P. 117 (1909).

[3] Defendant asserts that the appeal should be dismissed as not being timely and in support thereof points out the order appealed from was entered on October 28, 1976, and that the notice of appeal was filed on November 29, 1976, more than one month after the entry of said order.[5] Rule 6(a), U.R.C.P. is dispositive of this point in providing for the computation of time that the day of the act, event, or default after which the designated period of time begins to run is not included. Also, if the last day of the period falls on Sunday it is not included and such was the case here. Consequently, the appeal was timely filed.

The judgment of dismissal of the order to show cause is reversed and the case is remanded for hearing thereon. No costs awarded.

ELLETT, C. J., and MAUGHAN and WILKINS, JJ.

CROCKETT, Justice: (concurring in result, but dissenting in part).

I concur in the holding that the Order To Show Cause was issued on a valid judgment (the so-called Second Decree) and that it should not have been dismissed. But, I have some observations which I regard as of sufficient importance to record.

I do not see the necessity for the dictum that the filing of the "notice" or "objection" to the findings in the first divorce case, and leaving it undisposed of, would necessarily have the effect of preventing a divorce from becoming final. Nor do I believe that such a ruling is in conformity with sound policy or with our Rules of Procedure. Whatever effect it may have had here, there was something relating to the marital status between these parties that could be and was adjudicated by the Second Decree. That was done; and for the reasons stated above and in the main opinion, that judgment stands as valid and unassailed.

5. Rule 73(a), U.R.C.P. provides the time within which an appeal may be taken shall be one month from entry of judgment on order appealed from.

My apprehension is about any notion that the mere filing of such a "notice," or a motion, and leaving it undisposed of, whether designedly or inadvertently, would prevent otherwise valid proceedings and decrees thereon from ever becoming final. The multifarious mischiefs that might result in many of the thousands of divorce decrees upon which people rely and go their way, having children and accumulating property, etc., are so obvious that I spare extenuation thereon here.

It is my opinion that the language of Sec. 30-3-7, U.C.A.1953, that "the Decree of Divorce shall become absolute at the expiration of three months from the entry thereof; unless *an appeal or other proceedings for review* are pending . . ." should be understood as meaning "an appeal or other proceedings" in the nature of, or equivalent to, an appeal; and further, that an undisposed of motion does not reach that dignity.

Supporting the conclusion I advocate is the fact that the effect of the filing of such a motion (and other motions of similar character) is stated in Rule 73(a), U.R.C.P. that:

> . . . *The running of the time for appeal is terminated* by a timely motion made pursuant to any of the rules hereinafter enumerated . . . :
> Granting or denying a motion for judgment under Rule 50(b), . . .
> Denying a motion under Rule 52(b) to amend or make additional Findings of Fact, . . .
> Motion under Rule 59 to alter or amend judgment; or denying a motion for a new trial. [All emphasis herein added.]

But our rules do not provide for any other effect of the filing of such motions.

For the reasons above stated, I do not agree with and therefore exclude from my concurrence the statement that "a timely motion setting forth objections suspends all proceedings until the court disposes of the same." I think the rule should be that it does only what the statute and the rules above referred to say; *that it extends the time for appeal.* I appreciate that there is a basis for difference of view on this matter; and I therefore offer the suggestion that the rules should be amended to provide that if any such motion is not disposed of within a reasonable time, say 60 or 90 days after it is filed, it shall be deemed to be denied.

WEST KEYNUMBERSYSTEM

GILLHAM ADVERTISING AGENCY, INC., a corporation, Plaintiff and Respondent,

v.

Robert K. IPSON, dba Bonneville Raceways, Defendant and Appellant.

No. 14843.

Supreme Court of Utah.

July 12, 1977.

In action by advertising agency against racetrack operator for advertising debt, the Third District Court, Salt Lake County, Marcellus K. Snow, J., granted summary judgment in favor of agency and operator appealed. The Supreme Court, Ellett, C. J., held that operator, by signing as president of corporation a written agreement covering fees and setting time and conditions of payment prepared after he had failed to pay advertising debt, made himself liable, even if it had been an original obligation, where there was no such corporation of which he was president.

Affirmed.

Maughan, J., dissented and filed opinion in which Wilkins, J., concurred.

1. Corporations ⇐653

Where racetrack operator personally leased racetrack and personally conducted racing activity, advertising debt was personally his and not that of his Nevada cor-

striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."[18] In the present case the interest of the State corresponds to the education of its pupils which is the primary objective of the school district.

Rather than contradicting this interest the free expression of educational approaches and responsible criticism of school programs by employees of the school district facilitates the effective performance of public education. As long as the employee does not violate established policies of the school district responsible statements concerning those policies should not be curtailed and represent constitutionally protected speech.[19]

Therefore, Elwell's statements and positions concerning the middle school concept cannot be relied upon by the Board to support his termination.[20] However, this was specifically listed in Goodworth's letter of March 7, 1977, under charge number 2, as one example of Elwell's wilful failure and refusal to follow the policies of the Board. Similarly charge number 4, that Elwell admitted that he had not supported Board policies cannot be relied upon as cause for termination.

Likewise, the fact the remedial meetings between Mr. Elwell and Superintendent Goodworth were made public does not interfere materially with the efficiency of the public services performed by the school system. The interests of Mr. Elwell and the public's right to be informed, outweigh the relatively insignificant effect this disclosure would have on the already inconsonant relationship between the principal and the superintendent.[21] Therefore, notwithstanding the factual questions surrounding the disclosure of this information, Elwell's alleged disclosure of the fact that remedial meetings were in progress falls within the constitutional protections of free speech and cannot be relied upon as a basis for termination.[22]

Because constitutionally protected activities cannot constitute cause for termination, the ultimate findings of insubordination must be supported by the remaining charges presented by the March 7th and June 4th letters and evidence in support thereof. In the present case, the letter of June 4th indicates that the cause for Elwell's termination was insubordination. Thus, before we can decide whether the basic facts are supported by substantive evidence and whether those basic facts reasonably support the inferred ultimate fact of insubordination that term must be defined.

18. See *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 284, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977), (quoting from *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)).

19. See *Mt. Healthy City Board of Education v. Doyle*, supra note 18, 429 U.S. at 284, 97 S.Ct. at 574; *Bernasconi v. Tampa Elementary School District No. 3*, 548 F.2d 857 (9th Cir. 1977).

20. See *Board of Trustees, Laramie County School District No. 1 v. Spiegel*, Wyo, 549 P.2d 1161, 1174 (1976) ("Cause may not be found in a constitutionally-protected reason.")

21. While co-worker harmony is a factor to consider in determining the breadth of constitutional protections to expression in this area, that factor must be viewed in relation to the content of the employee's statements and the particular relationship in question. See *Pickering v. Board of Education*, supra note 18, 391 U.S. at 570, 88 S.Ct. at 1735. The mere act of expression cannot be repressed by the dictates of the employee's supervisor. As stated by the Wyoming Supreme Court in *Board of Trustees, Laramie County School District No. 1 v. Spiegel*, supra note 20, 549 P.2d at 1176: "... public school teachers may not be constitutionally compelled, as a condition of retaining their employment, to relinquish the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work...."

22. Although the notice may have been released in contradiction to Superintendent Goodworth's request, he has no more authority than the school system itself to restrict Elwell's constitutionally protected right of free expression, and his request to curtail that expression must be seen as unreasonable and unauthorized.

Insubordination as grounds for the termination of an employment contract of a tenured educator has been defined as: "... 'constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.' "[23]

While certain jurisdictions have held that insubordination includes a wilful refusal of a teacher to obey reasonable rules and regulations the better reasoned decisions place emphasis on the presence of a persistent course of wilful defiance.[24] Therefore, in the latter jurisdictions to constitute cause for termination, it must be established that the teacher embarked upon a persistent course of wilful defiance.[25]

Applying this definition, the basic facts found by the Board would have to establish a persistent course of wilful defiance by Elwell before they could reasonably support the ultimate fact of insubordination. The evidence presented at the hearing in question does not substantially support the basic facts required to establish a persistent course of defiance. Therefore, no substantive evidence has been presented which can reasonably support the ultimate finding of insubordination.[26] While the evidence relates a variety of intermittent trivial acts in variance with requests of the superintendent it does not detail any persistent defiance by Elwell. The intermittent infractions presented at the hearing are simply too insignificant to justify the ultimate sanction of non-renewal.

Also, the alleged findings of basic fact outlined in the June 4th letter do not reasonably support an inference of insubordination. Because that inference does not follow reasonably from the alleged basic facts presented after the hearing in the June 4 letter, the Board's decision is arbitrary and capricious.[27]

Therefore, appropriate substantive review of the evidence in support of the charges found in the June 4th letter would require the decision of the Park City School Board be overturned and the plaintiff reinstated to his previous position of employment. The majority's failure to undertake any substantive review of this decision, while accepting the letter of June 4th as the Board's findings of fact, results in what I believe is a critical emaseculation of the Utah Orderly Termination Procedures Act and the perpetration of an injustice.

23. *Ray v. Minneapolis Board of Education, Special School District No. 1*, 295 Minn. 13, 202 N.W.2d 375, 378 (1972); (quoting from *Shockley v. Board of Education*, 51 Del. 537, 149 A.2d 331, 334, reversed on other grounds, 52 Del. 237, 155 A.2d 323 (1959)). Thus, Elwell's alleged refusal to comply with Goodworth's request not to disclose the reconstruction work cannot support a finding of insubordination because the request was neither reasonable in nature nor issued with proper authority.

24. *Board of Trustees of Weston County School District No. 1 v. Holso*, Wyo., 584 P.2d 1009 (1978).

25. Id. at 1016.

26. See *Gwathmey v. P. T. Atkinson*, 447 F.Supp. 1113 (E.D.Vir.1976). See also *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966); *Johnson v. Butler*, 433 F.Supp. 531 (W.D.Vir.1977); *Board of Trustees, etc. v. Holso*, supra note 24, 584 P.2d at 1016.

27. *Bogart v. Unified School District, No. 298 of Lincoln County*, 432 F.Supp. 895 (D.Kan.1977). *Kruse v. Board of Directors of Lamont Community School District*, Iowa, 241 N.W.2d 626 (1975).

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WEST KEY NUMBER SYSTEM

Frank K. GILROY, Plaintiff,

v.

Peter M. LOWE and Martha Lowe, his wife, et al., Defendants and Appellants,

Wendell L. Butcher et al., Defendants and Respondents.

No. 16764.

Supreme Court of Utah.

Feb. 19, 1981.

Cross defendants appealed from the Third District Court, Salt Lake County, Ho-

mer F. Wilkinson, J., challenging an execution sale based on judgment rendered in favor of cross plaintiffs and against cross defendants. The Supreme court, Howe, J., held that: (1) sheriff was not prohibited from carrying out execution sale because cross defendants had filed and served a declaration of homestead prior to the sale, and (2) where judgment debtors had not paid any portion of sizable judgment against them and had not been subjected to collection of it by the original judgment creditor, any amounts recovered by the assignee apparently inured to the benefit of assignors, and there was no claim of prejudice to cross defendants resulting from partial assignment or from execution sale based on the assignment, partial assignment of judgment creditors' judgment to assignee and execution sale held thereunder were valid.

Affirmed.

1. Time ⇐9(5), 10(6)

Execution sale on October 22, 1979, which related to judgment rendered on October 22, 1971, was timely pursuant to rule providing that a writ of execution may issue at any time within eight years after entry of judgment, in that day from which time period is to run is excluded and the same calendar date of the final month or year is included when time period is measured in months or years from certain date, and furthermore, even if limitations period expired on October 21, 1979, that date was a Sunday, and time period extended until the end of the next day. Rules of Civil Procedure, Rules 6(a), 69(a); U.C.A.1953, 68-3-8.

2. Homestead ⇐66

Sheriff was not prohibited from carrying out execution sale of cross defendants' home on ground that cross defendants had filed and served a declaration of homestead prior to its sale, in that cross defendants' interest in home, $34,000, exceeded in value the amount of the homestead exemption, $8,000, and the assignee, which bid in $100,000 of the judgment against cross defendants, paid to sheriff on behalf of cross defendants $8,000, the amount representing homestead exemption. Const. Art. 22, § 1; U.C.A.1953, 28-1-1 et seq., 28-1-15.

3. Judgment ⇐920

Assignee of a portion of judgment against cross defendants was entitled to have execution issued, even though cross defendants asserted that purported assignee of judgment creditors' judgment was not, in fact, an assignee of judgment creditors' judgment, in that record provided ample support for finding that an assignment was made from judgment creditors to the assignee.

4. Judgment ⇐836

A judgment may be assigned to someone who is not a party to the initial action, and assignee receives the right to enforce such a judgment.

5. Judgment ⇐838

Where judgment debtors had not paid any portion of sizable judgment against them and had not been subjected to collection of it by the original judgment creditors, any amounts recovered by assignee apparently inured to the benefit of the assignor, and there was no claim of prejudice to cross plaintiffs resulting from partial assignment or from execution sale based on the assignment, partial assignment of judgment creditors' judgment to assignee and execution sale held thereunder were valid.

Richard J. Leedy, Salt Lake City, for defendants and appellants.

Earl D. Tanner & Associates, J. Thomas Bowen, Salt Lake City, for defendants and respondents.

HOWE, Justice:

This appeal challenges an execution sale based on a judgment rendered in favor of cross-plaintiffs Wendell L. and Irene B. Butcher and against cross-defendants and appellants Peter M. Lowe and Martha Lowe, his wife, in the amount of $309,479.90. Appellants contend that the execution sale should have been set aside because (1) the limitations period had expired at the time of the sale; (2) the filing and service of a declaration of homestead exempted appellants' home from a sheriff's sale to satisfy the judgment; and (3) the execution sale was void because it was instituted at the behest of an assignee of only a portion of the judgment.[1]

[1] Rule 69(a), Utah Rules of Civil Procedure, provides that a writ of execution may issue at any time within eight years after the entry of judgment. In this case the judgment was rendered on October 22, 1971, and the execution sale took place on Monday, October 22, 1979. Appellants characterize the time period between the two events as eight years and one day. They contend that the judgment lien was extinguished on October 21, and that the execution sale on the following day was, therefore, invalid. We disagree. The method of computing time periods relating to acts provided for by law is set out in Rule 6(a), Utah Rules of Civil Procedure, and §§ 68-3-7 and 8, U.C.A. 1953, as amended. When the time period is measured in months or years from a certain date, the day from which the time period is to run is excluded and the same calendar date of the final month or year is included. See *Albrecht v. Uranium Services, Inc.*, Utah, 596 P.2d 1025 (1979). Furthermore, even if the limitations period expired on October 21, 1979, that date was a Sunday, and the time period extended until the end of the next day. See *Nelson v. Jorgenson*, 66 Utah 360, 242 P. 945 (1926). The execution sale on October 22, 1979, was timely, as was properly found by the trial court.

The second issue raised by appellants is that the sheriff was prohibited from carrying out the execution sale because appellants had filed and served a declaration of homestead prior to the sale. A homestead right is mandated by Article XXII, § 1, Utah Constitution,[2] and further provided for by §§ 28-1-1 *et seq.*, U.C.A.[3] As appellants view the homestead exemption in light of its underlying policy, it is a complete bar to execution on a person's home regardless of its value or the amount of equity the judgment debtor owns in the home. This interpretation, however, would render meaningless the monetary limitations established by the Legislature to define the homestead exemption.

[2] The appellants in the present case are entitled by statute to a homestead exemption in the amount of $8,000, based on the legislative provision for $6,000 for the head of the family and $2,000 for the spouse. In their declaration of homestead appellants stated the value of their home to be $45,000, less the unpaid first trust deed of approximately $11,000, for a net value of $34,000. The appellants' interest in the home, therefore, exceeded in value the amount of the homestead exemption. A sale is not prohibited in these circumstances, but only when "the bid does not exceed the value of the exemption, when the homestead is in one piece." § 28-1-15, U.C.A.[4]

The principle that a homestead property may be sold when its cash value exceeds the exemption has previously been recognized by this Court. In *Payson Exchange Savings Bank v. Tietjen*, 63 Utah 321, 225 P.

1. Although appellants raise additional issues in their reply brief, these issues were not presented to the District Court and will not be considered for the first time on appeal.

2. Article XXII, § 1 states: The Legislature shall provide by law, for the selection by each head of a family, an exemption of a homestead, which may consist of one or more parcels of land, together with the appurtenances and improvements thereon of the value of at least fifteen hundred dollars, from sale on execution.

3. § 28-1-1 provides: A homestead consisting of lands, appurtenances and improvements, which lands may be in one or more localities, not exceeding in value with the appurtenances and improvements thereon the sum of $6,000 for the head of the family, and the further sum of $2,000 for the spouse . . . shall be exempt from judgment lien and from execution or forced sale.

4. The inflationary increase in housing values in recent years obviously dilutes the real protection afforded a homeowner by the statutorily-set dollar value of the homestead exemption. It is for the Legislature, however, and not for this Court to determine the need for policy implementation through changes in the law.

598 (1924), this Court stated that when a claim of homestead is made a judgment creditor is entitled to any excess above the value constituting the homestead right. See also *Ostler Land & Livestock Co. v. Brough*, 111 Utah 336, 178 P.2d 911 (1947); *Giesy-Walker v. Briggs*, 49 Utah 205, 162 P. 876 (1916). Cases cited by appellants deal primarily with situations in which the amount of the homestead exemption exceeded the value of the property and the levy of execution of a homestead was found to be void. See, e. g., *Panagopulos v. Manning*, 93 Utah 198, 69 P.2d 614 (1937). Such cases are not controlling here.

The homestead exemption is not a bar to execution in the present case. Assignee Federal Leasing, Inc., bid in $100,000 of the judgment against appellants and paid to the sheriff on behalf of appellants $8,000, the amount representing appellants' homestead exemption. The trial court ruled correctly that appellants were not entitled to claim the protection of the homestead exemption to set aside the execution sale.

[3] Appellants' final point is that Federal Leasing, Inc.,[5] which was the assignee of a portion of the judgment against appellants, was not entitled to have execution issued in this action. This issue was presented to the trial court in appellants' motion to set aside the execution sale, dated October 30, 1979, as follows:

> This motion is made on the [ground] that . . . Federal Leasing, Inc., the purported assignee of Butcher's judgment is not, in fact, an assignee of Butcher's judgment . . . .

The record, however, contains a document entitled "Partial Assignment of Judgment," dated August 31, 1979, and signed by Wendell L. Butcher, assigning to Federal Leasing $100,000 of the judgment against appellants and "all sums of money up to $100,000 that may be obtained by means thereof, or in or as a result of any proceedings had thereon." Federal Leasing was also given power of attorney "to use all lawful means for the recovery of the aforesaid money due . . . ." A copy of the assignment was presented to the sheriff at the time of the execution sale, as stated in the affidavit of J. Thomas Bowen, attorney for Federal Leasing and Wendell L. Butcher, dated October 31, 1979. A copy of the affidavit was mailed to counsel for appellants on October 31, 1979, several days prior to the hearing on appellants' motion on November 9. The record provides ample support for the finding that an assignment was made from judgment creditor Butcher to Federal Leasing.

[4] Appellants challenge the propriety of execution issuing at the direction of a "stranger or interloper to an action," but they cite no authority on this point. It is beyond question that ordinarily property or contract rights may be transferred to an assignee. A judgment may be assigned to someone who was not a party to the initial action, and the assignee receives the right to enforce such a judgment. See 46 Am. Jur.2d *Judgments* § 883 (1969); 49 C.J.S. *Judgments* § 522b (1947).

Appellants further challenge the partial assignment[6] as being invalid for being contrary to the "general rule" stated in 49 C.J.S. *Judgments* § 520 (1947) as follows:

> As a general rule a partial assignment of a judgment, while valid as between the parties, is of no effect against the judgment debtor unless he consents thereto or ratifies it.

This statement is grounded on several legitimate policy considerations. A debtor should not be subject to the annoyance or harassment of collection efforts by diverse and numerous creditors holding assignments of fractions of a single judgment. Nor should a judgment debtor be subject to further liability to an assignee when he has without notice of the partial assignment satisfied his obligation to the judgment creditor either by full payment or by payment of a lesser stipulated amount. A "secret" partial assignment may be unenforceable also in situations where it would adversely affect a third-party purchaser of property on which a judgment lien existed.

[5] This Court has not ruled on the validity of a partial assignment of a judgment and whether an assignee of a portion can properly direct the sheriff to execute on the debtor's property. An early Indiana case upheld an oral partial assignment and an execution issued thereon, *Wood v. Wallace*, 24 Ind. 226 (1865), and in *Madison & Pennings, Inc. v. Foundation Engineering Co.*, Tex.Civ.App., 390 S.W.2d 48 (1965), the court recognized that it was permissible to transfer only an interest in a judgment, citing *Great American Indemnity v. McMenamin*, Tex.Civ.App., 134 S.W.2d 734 (1939). In the instant case, the judgment debtor had not paid any portion of the sizeable judgment against him and had not been subjected to collection efforts by the original judgment creditor. Any amounts recovered by the assignee, Federal Leasing, apparently inured to the benefit of the assignor. There is no claim of prejudice to appellants resulting from the partial assignment or from the execution sale based on the assignment.

None of the reasons usually advanced for not recognizing partial assignments are here present, and we hold that under the facts of this case, the partial assignment and execution sale held thereunder are valid.

Affirmed. Costs to Respondents.

MAUGHAN, C. J., and HALL, STEWART and CROCKETT,* JJ., concur.

* CROCKETT, J., acted on this case prior to his retirement

5. Federal Leasing, Inc., is identified in respondents' brief as a corporation created as a result of the divorce of Wendell and Irene B. Butcher. It holds property in trust for their benefit.

6. The record does not disclose whether in the trial court the defendant raised the specific issue of the validity of an assignment of only a portion of a judgment. Although we recognize the soundness of the rule that issues may not be raised for the first time on appeal, the assignment in this case was challenged by appellants in the court below, and we therefore address the partial assignment question

Forace MARTIN and Eldean Martin, husband and wife, Plaintiffs and Respondents,

v.

Herta K. DENNETT, Herta K. Dennett as personal representative of John Elwood Dennett, Deceased; Elias J. Robinson; Eliza S. Robinson; Western Savings & Loan Company, as Trustee and as beneficiary; Interstate Brick Company; Bank of Salt Lake; Beneficial Life Insurance Company, The United States of America; The Industrial Commission of Utah; The Tax Commission of Utah; Southeast Ready Mix and John Runyon, dba Colorado Development Company, Defendants and Appellants.

No. 16781.

Supreme Court of Utah.

Feb. 19, 1981.

Personal representative of decedent's estate appealed from an order of the Third District Court, Salt Lake County, Christine M. Durham, J., which gave priority to federal tax liens recorded prior to decedent's death over claim made for reasonable funeral expenses and expenses of administration of decedent's estate. The Supreme Court, Stewart, J., held that the claims for reasonable funeral expenses and expenses of administration had priority over the federal tax lien, in that the federal statute which establishes the priority of tax claims refers to estates of deceased debtors which cannot cover all the "debt due from the deceased," and statute thus accords priority only to debts "due from the deceased" and does not include debts incurred by the estate, and the state statute which grants priority to funeral and administration expenses of an estate over debts of the deceased was controlling as to claims against the estate.

Reversed and remanded.

AFFIDAVIT OF SERVICE

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I hereby certify that a true and correct copy of the foregoing Plaintiff/Appellant Petition For Re-Hearing On Defendant/Respondents "Motion For Dismissal of Appeal" [Untimely Appeal] was mailed via United States Mail, first class, postage prepaid on the 13TH day of APRIL, 19 88, to the following:

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Authority

Rules of Practice in the District Court and Circuit Courts of the State of Utah;

Rule 2.9 "Written Orders, Judgments & Decrees";

U.C.A. 77-35-3 Rule 3 "Service & Filing of Papers";

U.R.C.P. Rule 5 "Service and Filing of Pleadings and Other Papers"

R. Utah Ct. App. Rule 21 "Filing and Service"

SUBSCRIBED and SWORN to before me this 13th day of April, 19 88.

Notary Public

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